Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 75-13

ROBERT I. FERGUSON,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

JOHN L. LAWLER
Attorney for Petitioner
903 Commercial Guaranty
Bank Bldg.
Post Office Box 1643
Mobile, Alabama 36601

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IN THE
SUPREME COURT OF THE
UNITED STATES

_____

NO.

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT
OF CRIMINAL APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the affirmance by the Alabama Court of Criminal Appeals of the judgment of the Circuit Court of Washington County, Alabama, entered in the above entitled case on October 30, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 8, 1975, and the opinion of the Alabama Court of Criminal Appeals dated March 4, 1975, have not yet been reported. Petitioner is advised the opinions were released to West

Publishing Company on June 4, 1975. Copies of the opinions were appended hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on March 4, 1975. A petition for rehearing was denied on the 1st day of April, 1975. The Supreme Court of Alabama entered a final order denying a petition for certiorari to the Alabama Court of Criminal Appeals on the 8th day of May, 1975.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3) and Rule 19, United States Supreme Court Rules.

QUESTIONS PRESENTED

1. Does a rule of law which provides for the striking of a tardily filed transcript in an appellate court on

motion of the State, if the appellant is not an indigent, deny equal protection of the law to non-indigent appellants, when the rule of law provides that a tardily filed transcript by an indigent will not be stricken on motion of the State?

2. Does the granting of an indigent defendant special rights on appeal require that the same rights be extended to non-indigent appellants under the Equal Protection clause of the United States Constitution?

3. When the court reporter at appellant's trial became aware that the appellant was unable to pay for the transcript of the evidence in his case within the time allowed for the filing of the transcript with the appellate court, after notice of appeal, did it become the

duty of the trial court to appoint counsel for the appellant on appeal and provide a free transcript of the proceedings?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V
(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV
Section 1.
(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was convicted of grand larceny on October 30, 1973, and on conviction gave notice of appeal. Although Petitioner's employed attorney at the trial gave notice of appeal and filed a motion for new trial and motion for probation, the affidavit of the Petitioner filed with the Alabama Court of Criminal

Appeals (App. Pg. 27) shows that Petitioner's employed attorney at the trial did not undertake the representation of Petitioner on appeal, and that he advised Petitioner to seek other counsel for the appeal.

The affidavit of Petitioner further shows that an attempt was made to employ counsel and to get the transcript of the evidence in the case prepared by the court reporter, and that Petitioner was delayed in retaining an attorney for appeal and getting the transcript of the evidence in that he did not have the necessary money to pay the fees which were required in advance. By the time Petitioner had employed an attorney on appeal, the time for filing the transcript of the evidence with the Clerk of the Circuit Court of Washington County,

Alabama, by the court reporter had already expired. This fact was not readily known by the attorneys handling Petitioner's appeal in that the court reporter who transcribed Petitioner's case and the Clerk's Office of Washington County had advised Petitioner's attorney erroneously that the motion for new trial had been denied on May 13, 1974. This is set out in the affidavit filed by Petitioner's attorney on the 27th day of February, 1975, which is supported by exhibits. (App. Pg. 30)

During the critical time period between the Petitioner's conviction and the date he employed attorneys to handle his appeal, he was without counsel and uninformed of the necessity of getting the transcript of the evidence filed with the Clerk of the Circuit Court of

Washington County, Alabama, within the time allowed by law.

Petitioner's attorneys, on discovery of this deficiency, filed with the Alabama Court of Criminal Appeals a motion that Petitioner be treated as an indigent during the period between his conviction and the time that he retained an attorney on appeal. (App. Pg.36)

This petition presents to the Court an opportunity for the Court to outline the duties of a trial court with regard to the ascertainment of a defendant's need for appointed counsel on appeal when the record shows that employed counsel was available at the trial. If a defendant is indigent at the time of trial and on conviction gives notice of appeal, the trial court encounters little difficulty in understanding its role in

the determination of the need for appointed counsel on appeal and with providing counsel for an indigent defendant. The constitutional requirement of counsel on appeal is easily satisfied in this situation. The Petitioner's case presents a problem not as easily answered. The Court of Criminal Appeals in its opinions in Brummitt v. State, 44 Ala. App. 78, 203 So. 2d 133, and Leonard v. State, 43 Ala.App. 454, 192 So. 2d 461, held that the transcript of the evidence may be tardily filed with the trial court if the appellant is an indigent. If the appellant has not been declared indigent and the transcript of the evidence is tardily filed, the transcript of the evidence will be stricken. This rule raises the constitutional question of whether or not the appellant received

equal treatment of law as guaranteed by the United States and Alabama Constitutions.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

There is no question that the Petitioner made known to the trial court his desire to appeal at the conclusion of the case. He did not, however, specifically request the appointment of counsel on appeal during the critical time within which the transcript of the evidence in his case was required to be filed with the trial court. As pointed out in Swenson v. Bosler, 386 U.S. 258, 18 L.Ed. 2d 33, 87 S.Ct. 996, it cannot be inferred from a defendant's failure to specifically request appointment of appellate counsel, that he has knowingly and intelligently waived his right to

the appointment of appellate counsel. The Petitioner's indigency was known to a responsible State officer. As shown by the affidavit of Petitioner filed in the Alabama Court of Criminal Appeals (App. Pg. 36), he talked with Mildred Womble, the court reporter who reported the proceedings at Petitioner's trial, about the preparation of the required transcript of the evidence. He was advised by Mrs. Womble that the transcript would have to be paid for in advance. She was aware that he was unable to make the payment during the critical time when the transcript of the evidence was due to be filed, however, she did not advise Petitioner nor did any other State officer advise Petitioner, of his right as an indigent to a free transcript and appointed counsel.

In Pate v. Holman, 341 F.2d 764, the Court outlined the responsibility of a trial court in appointing an attorney for a defendant on appeal when the defendant has had an employed counsel at the trial. Once a defendant has made known his desire to appeal and any responsible State official has become aware of his indigency, it becomes the duty of the Court to appoint counsel for such a defendant on appeal. Petitioner was at the time of his conviction, a resident of Waynesboro, Mississippi. His employed counsel at the trial has his office in Grove Hill, Alabama, and Circuit Judge William G. Lindsey, the trial judge at Petitioner's trial, serves a three county circuit which includes Choctaw, Clarke and Washington counties. Under these circumstances, conversations with

Mildred Womble about the inability of Petitioner to pay for the transcript in advance as required by Mrs. Womble, amounted to a communication with a responsible State officer of the Petitioner's indigency. Instead of being advised that he would have to save up the money to pay for the transcript of the evidence in his case, Petitioner should have been advised that he had a right to a free transcript and an appointed attorney if he could not afford one.

The Court of Criminal Appeals in its decision of March 4, 1975, considers the Petitioner to be a non-indigent, and because of this, denies him the benefit of the rulings made in Brummitt v. State, 44 Ala.App. 78, 203 So.2d 133, and Leonard v. State, 43 Ala.App. 454, 192 So.2d 461. As pointed out in

the dissenting opinion by Justice De Carlo and as pointed out in the dissenting opinion in Hadley v. State, 288 Ala. 293, 259 So.2d 853, the granting to an indigent defendant of special rights on appeal requires that the same rights be extended to non-indigent appellants under the Equal Protection Clause of the United States Constitution.

CONCLUSION

If the Petitioner is to be considered as a non-indigent, then he has been denied equal protection of the law in that two classes of appellants with unequal rights have been created by the decisions of the Court of Criminal Appeals of Alabama in this cause and in Brummitt v. State, supra, and Leonard v. State, supra. If Petitioner is to be considered as an indigent during that

critical time during which he was saving funds to pay the cost of attorney's fees and the fees for the preparation of the transcript of the evidence, then the tardy filing of the transcript of the evidence should be excused or the trial court has violated Petitioner's constitutional rights in not appointing for him an attorney on appeal and allowing him a free transcript.

This Court should grant certiorari because the Alabama Court of Criminal Appeals departed from accepted judicial proceedings, or sanctioned such a departure by the trial court. Due process of law requires the writ to issue.

Respectfully submitted,

HOWELL, JOHNSTON, LANGFORD,
FINKBOHNER & LAWLER

BY:_____
JOHN L. LAWLER
Attorney for Petitioner
Post Office Box 1643
Mobile, Alabama 36601

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 3rd day of July, 1975, served a copy of the foregoing Petition upon the Honorable William J. Baxley, Attorney General of the State of Alabama, by mailing a copy of same to his offices in Montgomery, Alabama, by United States mail, properly addressed and First Class postage prepaid.

_____
JOHN L. LAWLER
Attorney for Petitioner

APPENDIX

OPINION OF ALABAMA COURT OF CRIMINAL APPEALS

Mar 4 1975

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1974-75

1 Div. 508

Robert I. Ferguson
v
State

Appeal from Washington Circuit Court

TYSON, JUDGE

The appellant was indicted for the grand larceny of fifty butcher sows and one white boar, of the value of $3600.00 personal property of A. V. Campbell, Jr.

The appellant was represented at trial, on October 29 - 30, 1973, by retained counsel, and on October 30, 1973, was found guilty as charged by the jury. The trial court then entered judgment, setting sentence at three years imprisonment. On this same date, the appellant gave notice of appeal in open court.

On November 30, 1973, the appellant, through his retained counsel, filed a

motion for new trial, and this was continued by the trial court until February 5, 1974, at which time the cause was heard in open court, with the appellant and his attorney being present, and was denied.

On March 27, 1974, the appellant filed a motion requesting probation, which motion was continued until May 13, 1974, and following a full hearing in open court, was denied on this date.

The court reporter s transcript of the testimony in this cause was filed in the office of the circuit clerk on June 26, 1974. There were no extensions of time requested or shown in the record in this cause. Moreover, there is no showing of indigency anywhere in the transcript in this cause.

On May 13, 1974, a certificate of appeal was filed by the clerk of the Circuit Court of Washington County, which noted that the appellant's motion for new trial was denied on February 5,1974, and also that the appellant had given notice of appeal also on this same date.

On September 3, 1974, the Circuit Judge entered an order granting the circuit clerk thirty additional days in which to file the transcript of the record in the Court of Criminal Appeals of Alabama.

On September 26, 1974, the Court of Criminal Appeals, upon motion of the

appellant, granted an extension of sixty days for the circuit clerk to file the transcript of the record in this court. The certificate of the circuit clerk of Washington County, Alabama, is dated November 22, 1974, and the complete record was filed in this court on November 25, 1974.

I

In the case at bar, the Attorney General has filed a motion to strike the court reporter's transcript of the testimony as not being timely filed by the court reporter with the circuit clerk. There were no extensions of time requested by the appellant or his attorney, nor are there any extensions shown in this record to allow the court reporter additional time to file this record. See Rule 37,Supreme Court of Alabama, Revised Rules of Practice, Title 7, Appendix, Code of Alabama 1940; Wanninger v. Lange, 268 Ala. 402, 108 So. 2d 331; Relf v. State, 267 Ala. 3, 99 So.2d 216. See also Hadley v. State, 288 Ala. 293, 259 So. 2d 853.

As noted above, the appellant gave notice of appeal on the same date that the trial court originally pronounced judgment and sentence in this cause, October 30, 1973.

The appellant's motion for new trial was overruled on February 5, 1974, and also the appellant gave notice of appeal a second time on this date.

Thereafter, there were no extensions of time requested for the court reporter to file the transcript of the testimony with the circuit clerk.

As noted above, there is also no showing of indigency anywhere in the transcript in this cause.

We hold that the court reporter's transcript of the testimony should have been filed with the circuit clerk within sixty days from February 5, 1974, since this was the date on which the motion for new trial was overruled by the Circuit Court.

Under the opinion of the Supreme Court of Alabama in Relf v. State, supra, the sixty day period in which the transcript of the testimony in this cause could or should have been filed by the court reporter with the circuit clerk, began to run on this date.

Since the court reporter's transcript of the testimony was not filed with the circuit clerk within sixty days after the denial of the motion for new trial, the motion of the Attorney General to strike the transcript of the evidence is due to be granted. Relf v. State, 267 Ala. 3, 99 So. 2d 216; Granger v. State, 39 Ala. App. 461, 103 So. 2d 835; Albert v. State, 274 Ala. 579, 150 So. 2d 198, Holcombe v. State, 40 Ala. App. 205, 110 So. 2d 342.

Moreover, it should be here noted

that the order denying probation is not reviewable upon the appeal from the judgment of conviction. Parnell v. State, 35 Ala. App. 532, 49 So. 2d 919; Hughes v. State, 45 Ala. App. 250, 228 So. 2d 862; Hinkle v. State, 50 Ala. App. 215, 278 So. 2d 218.

The motion to strike the transcript of the evidence being granted, we have examined the record proper. It is in all respects regular. This judgment is therefore due to be affirmed and it is so ordered. Granger v. State, supra; Seibert v. State, 53 Ala. App. 229, 298 So. 2d 649, cert. denied 292 Ala. 748, 298 So. 2d 652. The transcript of the evidence is striken. Sweat v. State, 53 Ala. App. ___, 305 So. 2d 386, cert. denied 293 Ala. ___, 305 So. 2d 386.

The judgment is

AFFIRMED.

Cates, P.J., Harris and Bookout, JJ. concur;
DeCarlo, J., dissents.

DeCARLO, J., Dissenting.

This matter points up the wisdom of the dissent filed by our Chief Justice and the eminent Associate Justice James S. Coleman, Jr., in Hadley v. State, 288 Ala. 293, 259 So. 2d 853.

I wholeheartedly concur and file this dissent reiterating what they so masterfully said but minus the ability of their eloquence.

While I too, agree that indigents should be given an equal measure of justice and no less, it certainly smacks of inequality when one who is able to employ counsel is denied the right to perfect his appeal because the time specified for filing the transcript was not strictly adhered to, when under the same circumstances, one who was indigent would be allowed to implement his appeal and disregard the specifications and limitations.

Although I am aware of the attorney's responsibility to file the transcript within the required sixty days, it remains an escapable fact that regardless of where the fault lies in an indigent situation, the appeal would be considered timely in all respects.

There is something inherently wrong with a rule that, under the guise of equal justice, gives an indigent defendant far more rights than another who uses his own resources to obtain the same thing - justice.

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

APR 1 1975

1 Div. 508, Washington, Circuit Court

Robert I. Ferguson, Appellant

vs

State of Alabama, Appellee

APR 1 1975

Dear Sir: This is to advise you that on APR 1 1975 the Court of Criminal Appeals announced decision of;

[ ] No opinion.

[ ] xxxxxxxxxx
xxxxxxxxxxxxxx
application for rehearing overruled
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

in the above stated cause.

APR 1 1975

Yours truly,
MOLLIE JORDAN, CLERK

OPINION OF SUPREME COURT OF ALABAMA

May 8 1975

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1974-75

Ex parte Robert I Ferguson

SC 1226 Petition for Writ of Certiorari to Court of Criminal Appeals

(In re: Robert I. Ferguson

v.

State of Alabama)

ALMON, JUSTICE

WRIT DENIED.

Merrill, Bloodworth, Maddox, Jones, Shores and Embry, JJ., concur.

Heflin, C. J., and Faulkner, J., dissent.

HEFLIN, CHIEF JUSTICE (dissenting):

I would grant the writ for the reasons set out in my dissenting opinion in Hadley v. State, 288 Ala. 293, 259 So. 2d 853.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 8 day of May, 1975.

s/ J. O. Sentell
Clerk, Supreme Court of Alabama

AFFIDAVIT OF ROBERT I. FERGUSON

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

ROBERT I. FERGUSON, Appellant,
vs.
STATE OF ALABAMA, Appellee.

FIRST DIVISION

NO. 508

STATE OF LOUISIANA)
PARISH OF ST. CHARLES)

A F F I D A V I T

Personally appeared before me, the undersigned authority in and for the State of Louisiana and Parish of St. Charles, ROBERT I. FERGUSON, who, being by me first duly sworn, did say on oath as follows:

1. That he is the Appellant in the above-styled cause and that on being convicted in the above cause in the Circuit Court of Washington County, Alabama, on October 30, 1973, he did, through his attorney, Wayman O. Gilmore, who was employed by him for the trial of the case in the Circuit Court of Washington County, Alabama, give notice of appeal.

2. That Wyman O. Gilmore, your Affiant's attorney in the trial court, advised your Affiant that he did not handle appeals and suggested that Affiant employ another attorney for the purposes

of prosecuting his appeal.

3. That your Affiant, shortly after October 30, 1973, talked with several attorneys about handling the appeal in the above cause for him but that he was unable to pay the fees quoted by the attorneys and was further unable to pay the costs of the transcript in the cause in advance, as required by the attorneys and the court reporter who reported the above case.

4. That your Affiant was, during the latter part of 1973 and in early 1974 employed, but did not make sufficient monies to pay in advance the $350.00 required by the court reporter to transcribe the evidence in the above cause and it was necessary that your Affiant save from his earnings the necessary money to employ counsel and pay for the transcript of the evidence before any action could be taken on his appeal.

5. That your Affiant is unlearned in the law and did not know that if he had been adjudged indigent after his conviction in the above on October 30, 1973, that he could have been provided with a free transcript and had an attorney appointed to represent him, and Affiant states that he was not advised of this possibility by the trial court or by any other person he contacted regarding his right to appeal.

6. That on May 31, 1974, your Affiant had saved sufficient money to pay for

the transcript of the evidence in the above and to employ attorneys for the appeal, and Affiant states that the attorneys employed by him undertook his representation on receipt of the money from Affiant for the cost of the transcript and for their fee, which Affiant paid to attorneys for Affiant on May 31, 1974, and Affiant states that said attorneys undertook to represent him in this matter on June 7, 1974.

s/ Robert I. Ferguson
ROBERT I. FERGUSON

Subscribed and sworn to before me on this 13th day of March, 1975.

s/ (Signature Illegible)
NOTARY PUBLIC, STATE OF LOUISIANA
PARISH OF ST. CHARLES

My Commission Expires at Death

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 17 day of March, 1975, served a copy of the foregoing Affidavit upon Ms. Sarah M. Greenhaw, Assistant Attorney General, State of Alabama, and upon The Honorable William J. Baxley, Attorney General, State of Alabama, by mailing the same by United States mail, properly addressed and First Class postage prepaid.

s/ John L. Lawler
JOHN L. LAWLER, Attorney
for Affiant
Post Office Box 1643
Mobile, Alabama 36601

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE TRANSCRIPT OF RECORD AND DISMISS APPEAL

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

ROBERT I. FERGUSON, Appellant,	)	
	)	FIRST DIVISION
vs.	)	
	)	NO. 508
STATE OF ALABAMA, Appellee	)	

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE TRANSCRIPT OF RECORD AND DISMISS APPEAL

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned authority in and for the State of Alabama at Large, JOHN L. LAWLER, attorney for the Appellant, who being by me first duly sworn, did say on oath as follows:

1. That the Appellant Robert I. Ferguson employed John L. Lawler to prosecute his appeal in the above cause on June 7, 1974, and that upon being employed, Appellant's attorney contracted the Clerk's Office, Washington County, Alabama, and was advised that notice of appeal had been given in the above cause on May 13, 1974, and attached hereto as Exhibit "A" and made a part hereof is

Appellant's attorney's letter to the Court Reporter requesting preparation of the transcript of the evidence dated June 7, 1974, along with a copy of Mildred Womble, the court reporter's reply to Appellant's attorney's letter.

2. That by letter dated June 25, 1974, a copy of which is attached hereto, Mildred Womble, court reporter, Washington County, advised Appellant's attorney that she had transcribed the proceedings heard in the above on motion for new trial which said proceedings were stated by her to have been held on May 13,1974.

3. Appellant's attorney, in reliance on the advice of the Clerk's Office in Washington County, that notice of appeal had been given on May 13, 1974, and further in reliance on the written communication of the court reporter that notice of appeal had been given on May 13, 1974, computed the time for the filing of the transcript of the record in the above as being sixty (60) days from June 26, 1974, the date the transcript was filed, plus the thirty (30) day extension granted by the trial court, and the extension granted by the Court of Criminal Appeals.

s/ John L. Lawler
JOHN L. LAWLER
Post Office Box 1643,
Mobile, Ala. 36601

Subscribed and sworn to before me on this 26th day of February, 1975.

s/ Carole R. Bailey
NOTARY PUBLIC,
STATE OF ALABAMA AT LARGE

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 26th day of February, 1975, served a copy of the foregoing Affidavit upon The Honorable William J. Baxley, Attorney General of the State of Alabama, by mailing a copy of same by United States mail, properly addressed and First Class postage prepaid.

s/ John L. Lawler
JOHN L. LAWLER

June 7, 1974

Mrs. Mildred Womble
Washington County Courthouse
Chatom, Alabama 36518

RE: Robert Ferguson v. State of Alabama

Dear Mrs. Womble:

I have Mr. Ferguson's check for my fee and the deposit of $400.00 for the cost of preparing the transcript of the evidence in his case. I would appreciate your preparing the transcript and advising me when it has been completed and filed with the Clerk of the Court. I understand that the notice of appeal was given on May 13, 1974, and that the transcript will be due in the Circuit Clerk's Office on the 13th day of July, 1974. If you need additional time, please let me know and I will get Judge Lindsey to sign an order extending the time for the filing of the transcript.

Thank you for your kind assistance in this matter.

Very sincerely yours,

HOWELL, JOHNSTON, LANGFORD & FINKBOHNER

s/ John L. Lawler
John L. Lawler

JLL/cb

cc: Mr. Robert Ferguson

CIRCUIT COURT
FIRST JUDICIAL CIRCUIT OF ALABAMA
CHATOM, ALABAMA
36518
William G. Lindsey Judge
Mildred N.Womble Court Reporter

June 10, 1974

Hon. John L. Lawler
Howell, Johnston, Langford & Finkbohner
P. O. Box 1643
Mobile, Alabama 36601

Dear John:

Re: Robert Ferguson v. State of Alabama

Thank you for your letter advising me that you have the money in hand for the transcript in the Ferguson case. I am transcribing a deposition which I should finish Wednesday, (we have to go to Grove Hill for hearings tomorrow or I could finish it then), and I will start right on the Ferguson case. Unless something unforeseen comes up,I will have no trouble getting it ready by July 13,but if I do need extra time, Judge Lindsey will grant it.

Best regards to you and your family.

Cordially,

s/ Mildred Womble
Mildred Womble

CIRCUIT COURT
FIRST JUDICIAL CIRCUIT OF ALABAMA
CHATOM, ALABAMA

William G. Lindsey, Judge — Mildred N. Womble, Court Reporter

June 25, 1974

Hon. John L. Lawler
Howell, Johnston, Langford & Finkbohner
P. O. Box 1643
Mobile, Alabama 36601

Dear John:

Re: State of Alabama v. Robert I. Ferguson

I have completed the transcript of the Ferguson case, and also the proceedings had on the motion for new trial on May 13, 1974, and will file them with the Circuit Clerk tomorrow morning, June 26, 1974,as the Clerk's office closes at 4:00 p.m. and I didn't get it down there before they closed this afternoon.

I am enclosing my statement for my fee, and thank you so much for getting the money in advance, and for the opportunity to serve you. Any time I can do anything for you up here, just let me know.

60 days 2
June 26, 1974

Cordially yours,
s/ Mildred N. Womble
Mildred N. Womble
Court Reporter,
First Circuit

EXHIBIT "C"

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

ROBERT I. FERGUSON, Appellant,	)	FIRST DIVISION
vs.	)	NO. 508
STATE OF ALABAMA, Appellee	)	

MOTION OF APPELLANT TO BE CONSIDERED AS AN INDIGENT DURING TIME PERIOD OCTOBER 30, 1973, THROUGH JUNE 7,1974

Comes now the Appellant in the above cause, through his attorney, and represents and shows unto this Honorable Court that at the time of his conviction in the above cause on the 30th day of October, 1973, he did not have sufficient funds to employ an attorney to prosecute for him the appeal in the above, nor did he have sufficient funds to pay the $350.00 fee required by the court reporter to transcribe the evidence in the cause on appeal, and Appellant would further show that it was necessary for him to save money from his earnings until he had sufficient money to pay for the transcript and attorney's fees and that Appellant was without counsel on appeal from the date of his conviction until June 7, 1974, at which time he had saved sufficient money to pay for the

cost of the transcript and the fees of his attorney, and Appellant attaches hereto and incorporates herein by reference an affidavit executed by him which sets out the facts and circumstances surrounding the taking of his appeal in the above, and further Appellant incorporates the affidavit filed by his attorney on appeal, John L. Lawler, heretofore filed in this court on the 27th day of February, 1975.

WHEREFORE, the premises considered, Appellant prays that he be considered an indigent during the time period October 30, 1973 through June 7, 1974, and that the order of this Honorable Court heretofore sustaining the State of Alabama's motion to strike the transcript of the evidence for its being tardily filed with the Clerk of the Circuit Court of Washington County, Alabama, be revised and reversed in view of Appellant's indigency during said time period, and Appellant prays for such other, further and different relief as he may be entitled in the premises.

HOWELL, JOHNSTON,LANGFORD,
FINKBOHNER & LAWLER
Attorneys for Appellant

By: John L. Lawyer
John L. Lawyer
Post Office Box 1643
Mobile, Alabama 36601

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 17 day of March, 1975, served a copy of the foregoing motion upon the Honorable William J. Baxley, Attorney General of the State of Alabama, and upon Ms. Sarah M. Greenhaw, Assistant Attorney General of the State of Alabama, by mailing a copy of same by United States mail, properly addressed and First Class postage prepaid.

s/ John L. Lawler
John L. Lawler

Supreme Court, U. S.
FILED
AUG 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-13

ROBERT I. FERGUSON,
PETITIONER

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDICES

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COUNSEL FOR RESPONDENT

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Ferguson v. State,
54 Ala. App. ——,
313 So. 2d 561 (1975)

The Supreme Court of Alabama denied certiorari and this opinion is reported as follows:

Ferguson v. State,
293 Ala. ——.
313 So. 2d 564 (1975)

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on March 4, 1975, and to review the order of the Supreme Court of Alabama denying a petition for certiorari entered on May 8, 1975.

Petitioner applies for this writ of certiorari under the provisions of 28 U.S. C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a non-indigent, represented by retained counsel on appeal, is denied equal protection and due process as guaranteed by the Constitution of the United States by having his appeal dismissed for failure to timely file the transcript of the evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted of grand larceny on October 30, 1973, and on the same day gave notice of appeal. On November 30, 1973, petitioner filed a motion for new trial, which was continued until February 5, 1974, at which time it was denied.

On June 26, 1974, the transcript was filed with the circuit clerk. No extensions of time were requested for filing the transcript with the circuit clerk. On November 25, 1974, the record was filed in the Alabama Court of Criminal Appeals. Extensions of time for filing the record in the Court of Criminal Appeals were granted on September 3, 1974 and September 26, 1974. The Respondent filed a motion to strike the transcript of the evidence on the ground that the transcript of evidence had not been filed with the circuit clerk within sixty days from the day upon which appeal was taken or from the day upon which the motion for new trial was denied.

The Court of Criminal Appeals granted the motion and the Supreme Court of Alabama denied the petition for writ of certiorari to the Court of Criminal Appeals.

Petitioner was represented by a retained counsel both at trial and on appeal.

REASONS FOR DENYING THE WRIT

Respondent certainly agrees with petitioner that access to the courts must be made equally available to all without regard to financial status. And the State of Alabama has sought to do this by enacting certain statutes, Title 15, Sections 318(1) - 318(12) and Title 15, Sections 380(14) - 380(25), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement. These statutes provide an indigent with an attorney for trial, an attorney on appeal and a free transcript on appeal.

In the instant case petitioner had a retained attorney for the trial of his case and on appeal he had a retained attorney and a transcript of the proceedings. Petitioner was not denied equal protection of the law.

And the fact that the transcript of the evidence was stricken and the appeal affirmed because of failure to file timely does not deny petitioner of any of his constitutional rights.

Sections 827(1) and 827(4), Title 7, Code of Alabama 1940, Recompiled 1958, provide that the transcript of evidence must be filed within the circuit clerk's office within sixty days of the taking of an appeal or of the court's ruling on a motion for a new trial, whichever is later. Although the trial court may grant an extension of time for filing the transcript, Section 827(1a), there was not a request for an extension in this case.

In the instant case, petitioner gave notice of appeal on October 30, 1973. The record in this case also includes a certificate stating that notice of appeal was given on February 5, 1974. Title 15, Section 368, Code of Alabama 1940, Recompiled 1958, provides:

> "Appeals in criminal cases must be taken at the time of sentence or confession of judgment, or within six months thereafter in manner following: (a) An entry of record that defendant appeals from the judgment with or without suspension of judgment, as he may elect, to be taken at the time of judgment rendered, or, (b) the filing of a written statement signed by the defendant or his attorney that defendant appeals from the judgment the statement to be filed within six months; provided, however, that the trial court shall retain jurisdiction of the cause for the purpose of hearing and determining a motion for a new trial, seasonably made, and any appeal from a judgment of conviction shall also raise the question of the correctness of the court's ruling on a motion for a new trial made within the time allowed, and in the manner prescribed by law."

An appeal is taken within the meaning of the statute, when the record shows that defendant has expressed a desire to appeal and is deemed perfected if the defendant upon rendition of a judgment expresses a desire to appeal. *Relf v. State*, 267 Ala. 3, 99 So. 2d 216. *Albert v. State*, 274 Ala. 579, 150 So. 2d 198. Thus, any later compliance with subsection (b) of Title 15, Section 368, Code, is ineffectual. See *Relf v. State*, supra.

The motion for new trial was denied on February 5, 1974. The transcript was filed with the Clerk of the Circuit Court of Washington County, Alabama, on June 26, 1974, which is more than sixty days from the date of taking the appeal or the date the motion for new trial was denied.

It clearly appears that Sections 827(1)(4), supra, were not complied with. When the transcript is not timely filed with the circuit clerk in accordance with the above statute, then a motion to strike the transcript of the testimony will be granted and the case dismissed. *Hadley v. State*, 288 Ala. 293, 259 So. 2d 853, cert denied 409 U.S. 937, 34 L. Ed. 2d 190, 93 S. Ct. 245; *Albert v. State*, supra; *McDaniel v. State*, 39 Ala. App. 157, 96 So. 2d 319.

This has long been the rule in this State. It is necessary to have time limits for the filing of transcripts, otherwise

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it may be years in some instances before a case reaches an appellate court. This would be unfair to all parties involved.

And this Court has stated its approval of such limitations. In *Brown v. Allen*, 344 U.S. 433, 97 L. Ed. 469, 75 S. Ct. 397, the statement of the case was one day late. This Court held that defendants were not deprived of a constitutional right by the State Supreme Court's refusal to review the case after failure to perfect the appeal. This Court then stated that a period of limitations accords with its conception of proper procedure.

The dismissal of petitioner's case did not deny him equal protection or due process of the law. Federal courts have recognized that there is a difference in being represented by court-appointed counsel and being represented by retained counsel on appeal. A mistake by retained counsel in perfecting an appeal does not constitute a denial of due process. See *King v. Wainwright*, 368 Fed. 2d 57 (5th Cir. 1966), cert. denied 389 U.S. 995, 19 L. Ed. 2d 492, 88 S. Ct. 499 and *Plasett v. Page*, 439 Fed. 2d 770 (10th Cir. 1971).

In this State it is the duty of counsel for appellant to see that records pertaining to appeals are timely filed. *Seal v. State*, 282 Ala. 586, 213 So. 2d 645 (1968). Not only may the trial court grant an extension of time for the filing of the transcript, but may also grant an extension after the expiration of the sixty-day period.

Petitioner claims that he was indigent from October 30, 1973, the time of conviction, until June 7, 1974, and that his indigency was known to a responsible State official, namely, the court reporter. Petitioner filed affidavits and exhibits in support of this claim with the Court of Criminal Appeals. However, there is absolutely nothing in either the affidavits

or exhibits to indicate that the court reporter was aware of petitioner's financial status. Petitioner does not state in his affidavit that he advised the court reporter of his indigency, nor does he state that he even personally contacted or talked to the court reporter. Certainly, there is no allegation in the affidavit that the court reporter knew he was indigent.

Moreover, appellate courts in this jurisdiction are bound by the record and such record may not be supplemented, impeached, or contradicted by affidavits or exhibits. *Williams v. State*, 52 Ala. App. 207, 290 So. 2d 668, cert. denied 293 Ala. ——, 290 So. 2d 672. And this Honorable Court also adheres to the rule that affidavits or statements, not a part of the proceedings below, cannot be considered in the disposition of a case. *Hoyt v. Utah*, 114 U.S. 488, 29 L. Ed. 183, 5 S. Ct. 972; *Clark v. Commonwealth of Pennsylvania*, 128 U.S. 395, 32 L. Ed. 487, 9 S. Ct. 111; *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598.

Thus, the appellate courts in this State could not and did not consider the affidavits and/or exhibits.

CONCLUSION

Respondent submits that a non-indigent is not denied due equal protection of the law if the transcript of the evidence is stricken. If one retains an attorney on appeal then it is his his responsibility to see that a transcript is obtained and that records are timely filed. However, when a defendant is indigent the burden is on the State to see that he is provided with a transcript.

The failure to perfect petitioner's appeal was not due to any action or inaction on the part of the State officials. The

responsibility of perfecting the appeal rested on retained counsel.

For all of the foregoing reasons, respondent submits that petitioner was properly convicted and that none of his constitutional rights were violated. And, therefore, the writ of certiorari prayed for in this cause should be denied.

Respectfully submitted,

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APPENDIX A

TITLE 7, SECTIONS 827(1), 827(1a), and 827(4), 1940 CODE OF ALABAMA (RECOMPILED 1958)

§ 827(1). **Bills of exception abolished in certain courts; transcript of evidence.**—Bills of exception in the trial of cases at law in the circuit court and courts of like jurisdiction and all other courts of record having a full time court reporter and from which appeals lie directly to the court of appeals or the supreme court of Alabama, in the state of Alabama, are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered, he shall, within five days after he perfects his appeal give notice to the court reporter, in writing, that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions, rulings of the court, and the oral charge of the court, certify the same and file it with the clerk within sixty days from the date on which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. He shall also identify and copy all documents offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of error may be made as though the transcript constituted a bill of exceptions. If the reproduction of documents offered in evidence, such as maps or photographs, be difficult or impracticable, the court reporter shall so certify, and the clerk shall thereupon attach the original, or a photostatic copy thereof, to the transcript on appeal, and such original or photostatic copy thereof shall be a part of the transcript on appeal. If bulky or heavy objects be offered in evidence as exhibits which are not capable of being attached to the transcript, the court reporter shall certify

that such exhibits are bulky or heavy objects which are not capable of being attached to the transcript; that he has identified them as part of the transcript on appeal. The court reporter shall include in his certificate a statement that he has notified both parties or their attorneys of record of the filing of the transcript of testimony. (1943, p. 423, § 1, effective Sept. 1, 1943; 1951, p. 1527, § 1, appvd. Sept. 12, 1951; 1956; 1st Ex. Sess., p. 143, § 1, appvd. Feb. 9, 1956.)

§ 827(1a). **Extension of time for filing transcript; objections to ranscript; hearing and rulings thereon.**—The period of time within which the reporter must file the transcript may be extended by the trial court for cause. Within ten (10) days after the filing with the clerk of the certified transcript by the court reporter, either party may file with the clerk objections to the certified transcript, with his certificate that he has notified the opposing party, or attorney of record, that the same will be called to the attention of the trial court at a specified time and place. If no objections are filed within such ten (10) days the transcript shall be conclusively presumed to be correct. The hearing of objections and the ruling of the court thereon shall be concluded within a period of ninety (90) days from the date of the taking of the appeal, provided that this period may be extended by the trial court for cause. The trial court shall endorse its ruling on the transcript, sign the same, all within said ninety (90) days period, except as hereinbefore provided. Any ruling of the trial court upon such requested hearing, as well as any ruling on objections to a succinct statement, provided for in section 827(3) of this title, shall be reviewable, with error duly assigned by the dissatisfied party upon the appeal of the cause, and the evidence upon such hearing shall be duly certified by the court reporter. (1951, p. 1528, § 2, appvd. Sept. 12, 1951.)

§ 827(4). Time for filing transcript or statement.—The court reporter's certified transcript shall be filed with the clerk within sixty days from the date of the taking of the appeal or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later; and any succinct statement of the evidence made in lieu of such transcript, as authorized in section 827(3) hereof, shall be filed with the clerk within sixty days from the date of the taking of the appeal, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. Provided, that this period may be extended by the trial court for cause. (1943, p. 424, § 4, effective Sept. 1, 1943; 1951, p. 1529, § 6, appvd. Sept. 12, 1951; 1956, 1st Ex. Sess., p. 144, § 2, appvd. Feb. 9, 1956.)

APPENDIX B

TITLE 15, SECTIONS 318(1) - 318(12),
1940 CODE OF ALABAMA, (RECOMPILED 1958)
CUMULATIVE SUPPLEMENT

§ 318(1). What trial judge to ascertain before arraignment in noncapital case.—In all noncapital criminal cases wherein a defendant is charged with a serious offense in the circuit court, or court of like jurisdiction, or courts wherein the law provides a direct appeal to the supreme court or court of appeals to review such criminal proceedings, the trial judge shall before arraignment ascertain from the accused, or otherwise:

1. Whether or not defendant has arranged to be represented by and have the assistance of counsel.

2. Whether or not defendant desires the assistance of counsel.

3. Whether or not defendant is able financially or otherwise to obtain the assistance of counsel. (1963, p. 1136, § 1, appvd. Sept. 16, 1963.)

§ 318(2). Appointment of counsel for trial in such case.—If it appears to the trial court that such defendant is charged with a serious criminal offense and does not expressly waive the right to assistance of counsel, and is not able financially or otherwise to obtain the assistance of counsel, said court shall appoint counsel to represent and assist defendant and it shall be the duty of such counsel as an officer of the court and as a member of the bar to represent and assist said defendant. (1963, p. 1136, § 2, appvd. Sept. 16, 1963.)

§ 318(3). Compensation of counsel appointed for trial.—Counsel appointed in such cases shall be entitled to receive for their services a fee to be fixed by the trial court not to exceed $100.00 per case.

Within a reasonable time after the conclusion of the trial or ruling on a motion for a new trial, or after an acquittal or other judgment disposing of the case, counsel shall submit to the trial court a bill for services rendered not to exceed the amount herein provided and such bill, if approved by the trial court, shall be submitted by the clerk of the court to the state comptroller for audit and allowance and if approved by the comptroller forwarded to the state treasurer for payment. (1963, p. 1136, § 3, appvd. Sept. 16, 1963.)

§ 318(4). **Appointment of counsel for appeal.**—In all criminal cases wherein a defendant has been convicted of a serious offense in which an appeal lies directly to the supreme court or court of appeals, and if said defendant expresses his desire to appeal said conviction, the court shall cause to be entered upon its minutes a recital of notice of appeal. The court shall then ascertain and make findings in reference to the appeal concerning those items listed as 1, 2, and 3 in section 318(1) of this title.

If it appears that defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and defendant expresses the desire for assistance of counsel the trial court shall appoint counsel to represent and assist defendant on appeal. The presiding judge of the court to which the appeal is taken shall have authority to appoint counsel in the event the trial court fails to appoint, and in the event it becomes necessary to further provide for counsel. It shall be the duty of such counsel as an officer of the court and as a member of the bar to represent and assist said defendant in the appeal. (1963, p. 1136, § 4, appvd. Sept. 16, 1963.)

§318(5). **Compensation of counsel appointed for appeal.**—Counsel appointed for the appeal shall be entitled to receive for their services a fee to be fixed by the appellate

court not to exceed $150.00 per case. Within a reasonable time after the disposition of the appeal, counsel shall submit to the appellate court a bill for services rendered, not to exceed the amount herein provided and such bill, when approved by the presiding judge or chief justice of the appellate court, shall be submitted by the clerk of the appellate court to the state comptroller for audit and allowance and if approved by the comptroller forwarded to the state treasurer for payment. (1963, p. 1137, § 5, appvd. Sept. 16, 1963.)

§ 318(6). **Appointment of counsel in certain proceedings involving life and liberty.**—In proceedings filed in the circuit court, or courts of like jurisdiction, or courts wherein a direct appeal lies to the supreme court or court of appeals, involving the life and liberty of those charged with or convicted of serious criminal offenses, including proceedings for habeas corpus and coram nobis or other post conviction remedies, and in appeals, applications for leave or review in such proceedings, the trial or presiding judge or chief justice of the court in which such proceedings may be commenced or pending may appoint counsel to represent and assist those persons so charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of such judge to assert or protect the rights of such person. It shall be the duty of such counsel as herein provided to represent and assist said person in said proceeding. (1963, p. 1137, § 6, appvd. Sept. 16, 1963.)

§ 318(7). **Compensation of counsel appointed in such cases.**—Counsel appointed in such proceedings shall be entitled to receive for their services a fee to be fixed by the judge appointing him not to exceed $100.00 per case to be

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submitted, approved and paid in the same manner as hereinabove provided. (1963, p. 1137, § 7, appvd. Sept. 16, 1963.)

Quoted in Ex parte Anderson, 42 Ala. App. 294, 161 So. 2d 507 (1964).

§ 318(8). Ascertaining fact of indigency.—In ascertaining the fact of indigency as required by sections 318(1)-318(11) of this title the judge in said proceeding may order the sheriff, the solicitor, parole or probation officers, or the department of pensions and security, to make investigation and file a report with the court. (1963, p. 1137, § 8, appvd. Sept. 16, 1963.)

Quoted in Ex parte Anderson, 42 Ala. App. 294, 161 So. 2d 507 (1964).

§ 318(9). Schedule and recommendations of bar associations to be considered.—In making appointments of cuonsel and in fixing or approving the amount of the fees of counsel for services rendered, the judge or court shall take into consideration any schedule or recommendations of the county or state bar association. (1963, p. 1138, § 9, appvd. Sept. 16, 1963.)

§ 318(10). Authority of courts or judges to make rules.—Courts or judges having authority under sections 318(1)-318(11) of this title may adopt and promulgate such rules not in conflict with rules of the supreme court as may be necessary and proper to carry out the provisions of such sections and such rules when adopted shall have the force and effect of law. (1963, p. 1138, § 10, appvd. Sept. 16, 1963.)

§ 318(11). Annual appropriations and expenditures therefrom.—There is hereby appropriated annually out of the general fund in the state treasury the sum of thirty-five thousand ($35,000) dollars to carry out the purposes of section 318(1)-318(11) of this title.

Expenditures from this appropriation shall be subject to the approval of the governor and the condition of the general fund. The governor shall from time to time determine the condition of the said general fund and whether or not such expenditures can reasonably be made. (1963, p. 1138, § 11, appvd. Sept. 16, 1963.)

§ 318(12). Assessment of counsel fees as court costs in certain cases.—Whenever a court appoints counsel for a defendant in a criminal case as authorized or provided for by law, the court may, in its discretion, if the defendant is convicted, award his counsel a reasonable fee for his service which shall be assessed as a part of the costs in the case, to be collected as other costs. Provided, that the state of Alabama shall not be required to pay counsel fees in criminal cases except as provided in Act No. 526, S. 352, approved September 16, 1963 (Acts 1963, v. 2, p. 1136) [sections 318(1) to 318(11) of this title].

In determining the amount of fee to be allowed counsel under this section, the court shall consider customary fees in the community for similar services, the time spent by counsel on the case, counsel's experience in such cases, the skill displayed by counsel, difficulty of defense, any agreement as to fees which may exist between the counsel and defendant, and such other factors as the court deems relevant. (1967. Ex. Sess., p. 229, appvd. May 10, 1967.)

APPENDIX C

TITLE 15, SECTIONS 380(14)-380(25),
1940 CODE OF ALABAMA, (RECOMPILED 1958)
CUMULATIVE SUPPLEMENT

§ 380(14). **Purpose of sections 380(14)-380(25).**—The legislature is aware that it has become settled law that a state may or may not authorize appeals from judgments of convictions in criminal cases, and certain other related proceedings involving the life, liberty or property of a person convicted of a criminal offense. Further, that if a state does provide for appeals in criminal cases and such other cases, defendants or petitioners adjudged guilty of crimes and who are without funds and unable to pay the fees of the court reporter for transcribing the evidence, or the fees of the clerk for preparing the record, for review on appeal may be denied equal protection of the law or due process of law. It is the purpose of sections 380(14)-380(25) of this title to provide such defendants or petitioners with a transcript of the evidence or a part thereof and a record for a proper and equal review in certain criminal cases and such other cases wherein it is made to appear that a convicted defendant is indigent and desires to take an appeal and obtain a judicial review of matters that occurred at his trial, or hearing. (1961, Ex. Sess., p. 1930, § 1, appvd. Sept. 15, 1961; 1963, p. 1129, §1, appvd. Sept. 16, 1963.)

§ 380(15). **Application of sections 380(14)-380(25).**—Sections 380(14)-380(25) of this title shall apply to all criminal cases tried in the courts of the state of Alabama where a direct appeal to the supreme court or court of appeals is provided by law; also to all related or collateral proceedings, including habeas corpus and coram nobis proceedings, involving the life, liberty or property of a person convicted

of a criminal offense where an appeal is provided to the supreme court or court of appeals. (1961, Ex. Sess., ?????

§ 380(16). **Verified petition of indigent convicted person for transcript.**—In such criminal cases where the defendant has been adjudicated guilty by the trial court he may, if no motion for a new trial is filed, within ten days after the last day on which a motion for a new trial could have been filed, or within ten days after the ruling of the trial court upon a motion for a new trial, duly filed and ruled on adversely to defendant, file with the clerk or the trial judge of the court wherein such defendant was adjudicated guilty and sentenced, a petition in writing, sworn to and subscribed by said defendant, stating that defendant desires to take an appeal under the provisions of sections 380(14)-380(25) of this title. Such petition must identify the style of the case, the offense for which defendant was convicted, the plea made by the defendant, the date of the adjudication of guilt and the sentence and the punishment therefor, and the name of the court imposing such punishment, together with the name of the trial judge. Such petition shall also contain the full name of the defendant, together with a statement that he desires to appeal either from the judgment of conviction or from the adverse ruling on the motion for a new trial, or both. Such petition must contain an averment that the defendant is without sufficient funds, and has no reasonable way to procure the same, to pay the court reporter all of his lawful fees for transcribing the evidence and other proceedings had at the trial of said cause, or the fees of the clerk for preparing the record. In such other cases, including habeas corpus and coram nobis, which are related or collateral proceedings to a conviction of a criminal offense, and which proceedings involve the life, liberty or property of a person convicted of a crime, the person convicted may within ten days after a judgment or order dis-

posing of the proceedings adversely to said person file with the clerk or the trial judge of the court making said order a similar petition describing and identifying the proceeding; and stating the desire of the petitioner to appeal under the provisions of sections 380(14)-380(25) of this title. (1961, Ex. Sess., p. 1931, § 3, appvd. Sept. 15, 1961; 1963, p. 1130, § 3, appvd. Sept. 16, 1963.)

§ 280(17). **Same; averments as to errors at trial.**—The sworn petition must aver facts stated with particularity of errors in the proceedings in the trial court which are claimed by the defendant or petitioner as a basis for the appeal. (Such averments of error need not be expressed in any technical form, but must clearly indicate what is intended thereby.) If the defendant or petitioner alleges that the evidence is insufficient to support the verdict or adjudication of guilt, or other judgment or order of the court, the statement must contain averments of fact, stated with particularity, describing the area in which the evidence is lacking. (1961, Ex. Sess., p. 1931, § 4, appvd. Sept. 15, 1961; 1963, p. 1131, § 4, appvd. Sept. 16, 1963.)

§ 380(18). **Hearing on petition; investigation of petitioner's finances.**—Upon the filing of the petition with the clerk or the trial judge within the time prescribed herein, the trial judge shall have the defendant or petitioner brought before him and shall examine the defendant or petitioner under oath concerning the required averment in the petition that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure the same, to pay the court reporter all of his lawful fees for transcribing the evidence and other proceedings had at the trial or on the hearing of said cause or the fees of the clerk which will accrue on appeal. The trial court at such hearing may issue subpoenas for witnesses as deemed necessary and may call upon

the sheriff, the solicitor, and other officers of the court to ascertain information relevant to the financial condition and ability of defendant or petitioner. The trial judge shall find from the court reporter or reporters who took stenographic notes at the trial or hearing a general estimate of the costs of transcribing the evidence and other proceedings occurring at the trial or such part thereof as may be necessary to be transcribed to afford the appellate court with a record of sufficient completeness as a basis for a fair review of the points insisted upon by defendant or petitioner, and shall also ascertain from the clerk a general estimate of the amount of fees which will be due to said clerk incident to an appeal.

The trial court either before, after, or during said hearing may designate a probation officer of the court or may designate the county department of pensions and security to make inquiry and ascertain facts concerning the financial condition and ability of defendant or petitioner, and it shall be the duty of such agencies to investigate and file a written report of its findings with the trial judge. Such report shall state with certainty any and all sources from which defendant or petitioner could be expected to obtain financial aid to pay such fees. (1961, Ex. Sess., p. 1932, § 5, appvd. Sept. 15, 1961; 1963, p. 1131, § 5, appvd. Sept. 16, 1963.)

§ 380(19). **Findings as to petitioner's ability to pay for transcript.**—If the trial judge is satisfied that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure the same, necessary for the payment of court reporters' fees or the clerks' fees, he shall cause said finding to be entered on the minutes of the court. If the trial judge finds to the contrary, he shall also cause said findings to be entered on the minutes of the court, stating his reasons therefor. If the trial judge finds that the defendant or petitioner is unable to pay all of the court reporter's fees, or all

of the clerk's fees, but is able to pay a part, he shall cause to be entered upon the minutes of the court such finding and shall state his reasons therefor and state the amount in money that defendant or petitioner can reasonably pay. The burden shall be upon the convicted defendant or petitioner to satisfy the trial judge that said defendant or petitioner is without said sufficient funds, and has no reasonable way to procure the same. If the trial judge is in doubt after such investigation as he deems proper, he shall deny such petition in whole or in part and state his reasons therefor, and cause the same to be entered on the minutes of the court. (1961, Ex. Sess. p. 1932, § 6, appvd. Sept. 15, 1961; 1963 p. 1132, § appvd. Sept. 16, 1963.)

§ 380(20). Orders that transcript be prepared and that all or part of fees be paid by state.—If it appears to the trial court after full investigation that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure same, to pay the court reporter all of his lawful fee for transcribing the evidence, and other proceedings had at the trial, or the fees of the clerk incident to an appeal, or that defendant or petitioner has reasonably available to him only enough funds to pay a part of such fees, he shall make and enter an order requiring the court reporter to transcribe all or such parts of evidence of the proceedings occurring at the trial that may be necessary to afford the appellate court a record of sufficient completeness for review and shall order the clerk to prepare the record for appeal. The trial court shall at said time make and enter an order authorizing the payment of a sum certain to the court reporter of all or a part of his estimated fees calculated at the rate provided by law upon the completion and delivery of a transcript and three carbon copies thereof, duly certified and filed with the clerk, one of said carbon copies to be delivered by

the clerk to the defendant or petitioner. The court shall also at said time make and enter an order authorizing the payment of a sum certain to the clerk of all or a part of his estimated fees incident to the appeal. Such order shall not be made unless and until the defendant or petitioner has paid to the court reporter and to the clerk that part of the amount due the court reporter and the clerk which the court has found must be borne by defendant or petitioner, and the defendant or petitioner shall furnish to the court satisfactory evidence of such payment. The trial court shall cause a certified copy of such order to be delivered to the court reporter and to the clerk and upon filing of said transcript and three carbon copies thereof by the court reporter with the clerk of the trial court and the complete preparation of the record on appeal by the clerk, the clerk shall transmit such order to the state comptroller, whereupon the state comptroller shall cause to be paid to the court reporter and to the clerk out of the general funds in the state treasury, not otherwise appropriated, the amount of said fees. (1961, Ex. Sess., p. 1933, § 8, appvd. Sept. 15, 1961; 1963, p. 1132, § 7. appvd. Sept. 16, 1963.)

§ 380(21). Application of sections 380(14)-380(25) to pending appeals and cases.—All appeals presently pending in the supreme court of Alabama and in the court of appeals of Alabama on the effective date of sections 380(14)-380(25) of this title, in which a request for a free transcript of the evidence is contained in the record and in which no transcript of the evidence appears, may be remanded to the trial courts from which such appeals were taken for proceedings pursuant to the provisions of such sections. Such proceedings shall not be dismissed in the trial court because of the failure of the defendant or petitioner to request an appeal and transcript within the time and in the manner required herein, but the

trial court shall cause the defendant or petitioner to be notified of the remandment of the cause and of his opportunity to file a petition as provided in such sections. Such defendants or petitioners may file their petitions for a transcript under the provisions of such sections within ten days after such notification but not afterward.

In all other cases where the time for taking an appeal has not expired on the effective date of sections 380(14)-380(25) of this title such defendants or petitioners, if an appeal has been taken, may file a petition under the provisions of such sections and such petition shall not be dismissed because of the failure of such defendants or petitioners to file such petition within the time herein otherwise prescribed, provided such petition is filed within ten days after the effective date of such sections. The trial court in such cases shall notify the court to which said appeal has been taken of the filing and pendency of said petition and shall further notify the appellate court of the decision on the petition when made.

Where an appeal has not been taken upon the effective date of sections 380(14)-380(25) of this title and there remains time within which an appeal may be taken defendant or petitioner may also file a petition under the provisions of such sections within ten days from the effective date hereof.

It is the intent and purpose of sections 380(14)-380(25) of this title that all convicted defendants or petitioners have a period of ten days within which to file a petition under the provisions of such sections after the effective date hereof when the time for taking an appeal has not expired. (1961, Ex. Sess., p. 1934, § 9, appvd. Sept. 15, 1961; 1963, p. 1133, § 8, appvd. Sept. 16, 1963.)

§ 380(22). Appeal from orders of trial court; proceedings on appeal; costs.—Any defendant or petitioner who has filed

a petition under the provisions of sections 380(14)-380(25) of this title, and which petition is denied by the trial court, or if parts of the record ordered to be transcribed are deemed to be inadequate by defendant or petitioner, said defendant or petitioner may within ten days from the order of the trial court file a notice of appeal with the clerk of the trial court from the order denying the petition or from the order deemed inadequate in specifying the parts of the transcript of the evidence to be forwarded to the appellate court on appeal, and such notice of appeal shall specify with particularity wherein defendant or petitioner considers himself aggrieved by the order of the trial court; whereupon the trial judge shall cause to be certified and transmitted to the court of appeals, in cases wherein the punishment is twenty years or less and to the supreme court in cases where the punishment exceeds twenty years, the file of the trial court in said proceedings to obtain a transcript and record, containing the petition and reports made in writing to the court, the court reporter's estimate of the cost of the transcript, and the estimate of the clerk of his fees incident to an appeal, and a certified copy of the order or orders entered by the trial court, and other relevant papers pertaining to the petition, together with an opinion or statement of the trial court, as the trial court shall deem necessary. Upon receipt of said court file by the court of appeals or the supreme court, such court shall proceed to determine the matter of whether or not a transcript of the evidence and a complete record for appeal should be ordered, prepared and filed and paid for as provided for in sections 380(14)-380(25) of this title, and shall render such judgment as in its opinion should have been rendered below or such appellate court may remand such proceedings to the trial court for further proceedings as said appellate court may deem proper.

Such proceedings in the appellate court shall be docketed

and filed as other appeals and shall be considered and disposed of without delay. The defendant filing said petition in the trial court shall have the right to file such brief and argument as he so desires and in like manner the state may file such brief and argument. There shall be no costs or charges attending said appeals. (1961, Ex. Sess., p. 1934, § 10, appvd. Sept. 15, 1961; 1963, p. 1133, § 9, appvd. Sept. 16, 1963.)

§ 380(23). Judgment for costs against petitioner if appeal disposed of unfavorably to him; additional sentence for costs.—In appeals taken under the provisions of sections 380(14)-380(25) of this title, if the judgment or order of the trial court be affirmed or disposed of otherwise unfavorably to the defendant or petitioner, the supreme court or the court of appeals affirming said judgment or order shall enter a judgment for costs against defendant or petitioner, including an amount equal to the fees of the court reporter paid by the state for transcribing the evidence and the fees of the clerk incident to the appeal paid by the state. If said costs are paid by defendant or petitioner or by another in his behalf, such costs shall be paid into the general fund of the state of Alabama. If such costs are not presently paid by the defendant or petitioner or by another in his behalf, execution shall be issued by the trial court upon said judgment against the defendant or petitioner, and if said execution is levied and collected, the proceeds thereof shall be paid into the general fund of the state. If such execution is returned to the trial court "no property found," the defendant or petitioner shall be sentenced additionally by the trial court at hard labor for the county (if the punishment for the offense is a fine or confinement in the county jail or hard labor for the county), or by imprisonment in the state penitentiary (if the punishment for the offense is imprisonment in the penitentiary) for an

additional term to pay said costs at the rate of $5.00 per day. (1961, Ex. Sess., p. 1935, § 11, appvd. Sept. 15, 1961; 1963, p. 1134, § 10, appvd. Sept. 16, 1963.)

§ 380(24). Rules of court regarding transcripts for indigent persons.—The supreme court of the state of Alabama with the advice and consultation with the court of appeals of Alabama is hereby authorized to adopt all needful rules and regulations designed to accomplish the purposes set forth in sections 380(14)-380(25) of this title; such rules and regulations duly adopted shall have the force and effect of law. The circuit courts and other courts of the state having jurisdiction over proceedings under such sections shall have authority to adopt all needful rules and regulations not in conflict with the rules of the supreme court designed to accomplish the purposes set forth in such sections. (1961, Ex. Sess., p. 1936, § 12, appvd. Sept. 15, 1961; 1963, p. 1135, § 11, appvd. Sept. 16, 1963.)

§ 380(25). Appropriation to carry out sections 380(14)-380(25). There is hereby appropriated annually out of the general fund of the state treasury, the sum of fifteen thousand ($15,000) dollars, not to be exceeded in any one fiscal year to pay said court reporters and clerks and to carry out the provisions of sections 380(14)-380(25) of this title. Expenditures from said appropriation are subject before disbursement to the approval of the governor and contingent upon the opinion of the governor of the condition of the state treasury. (1961, Ex. Sess., p. 1936, § 13, appvd. Sept. 15, 1961; 1963, p. 1135, § 12, appvd. Sept. 16, 1963.)

CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, and I, Sarah M. Greenhaw, one of the attorneys for respondent, hereby certify that on this 4th day of August, 1975, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendices on the Honorable John L. Lawler, whose address is 903 Commercial Guaranty Bank Building, Post Office Box 1643, Mobile, Alabama 36601, attorney for the petitioner, by mailing said copies to him at the aforesaid address with the postage prepaid.

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